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(20,199.)

IN THE

Supreme Court of the United States.

October Term, 1906.

No. 256.

WATSON STEWART, *Appellant*,

v.

THE UNITED STATES AND THE OSAGE NATION OF INDIANS.

BRIEF ON BEHALF OF THE OSAGE NATION,

ONE OF THE APPELLEES.

LORENZO A. BAILEY,
Attorney for THE OSAGE NATION.

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WATSON STEWART, *Appellant*,

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THE UNITED STATES AND THE OSAGE NATION OF INDIANS.

Brief on Behalf of THE OSAGE NATION, one of the Appellees.

STATEMENT OF THE CASE.

In 1865 the United States sought to obtain and open up for settlement the lands then occupied by the Osage Nation in the State of Kansas. This was the definite purpose of the United States in entering into the treaty of September 29, 1865 (14 S. L., 687), with the Osages.

By Articles I, II and XVI of the treaty all said lands were divided into three parts, which are designated, respectively, ceded lands, trust lands and diminished reserve lands; all which the United States thereby received in trust with power of sale; the Osages, however, reserving the right to remain in possession of the diminished reserve lands until a new home should be provided for them by the purchase of lands in Indian Territory, to be paid for out of the proceeds of the

sale of the Kansas lands. Such new home was accordingly so provided for them and paid for.

The general effect of the treaty was to convey the lands to the United States, in trust, and to require the United States to survey and sell the lands; to pay the expense of such survey and sale and all expense incident to the proper execution of the trust and look to the proceeds of sale for reimbursement; to place $300,000, together with the net proceeds of the sale of the trust and diminished reserve lands, in the Treasury as a trust fund, to the credit of the Osages, out of which the price of their new home in Indian Territory was to be paid; and to pay the Osages interest at the rate of five per centum per annum on the remainder of said trust fund.

The treaty was ratified January 21, 1867, and immediately thereafter the United States proceeded to make the survey and sale in the manner and by the means therein expressly provided, to wit: as the public lands were surveyed and sold, and under the direction of the same officers of the Government who were by law charged with the duty of directing the survey and sale of the public lands.

The registers and receivers of the land office in the State of Kansas were duly instructed to perform in reference to these lands situated in their respective land districts the same services which by law they were required to perform in and about the sale of public lands, and were also duly instructed that their entire compensation for all such services, including those rendered in the sale of the Osage lands as well as in the sale of the public lands, was limited to the legal maximum. These instructions, as to the ceded and trust lands, were issued November 23 and December 19, 1867, by the General Land Office, by authority of the Secretary of the Interior; copies of such instructions being then sent to the register and receiver at Humboldt, Kansas (R., 7, 8).

Thereafter, while said instructions were in full force,

Watson Stewart, the appellant, was appointed register of the United States Land Office at Humboldt, Kansas, and on May 12, 1869, entered upon, and thereafter until November 20, 1871 (R., 7), continued to perform the duties of such register, as well in reference to the public lands as also in reference to the Osage lands situate within his land district, without protest or objection on his part and without any notice or intimation to any one that he would not accept the terms of compensation stated in said instructions or that he would claim or expect any other or further compensation.

On March 28, 1871, during his term of office, the appellant and the other registers and receivers in Kansas, were instructed by the General Land Office to proceed with the sale of the diminished reserve lands, subject to the same limitation as to compensation as stated in the instructions of November 23 and December 19, 1867 (R., 9).

During his entire term of service, from May 12, 1869, to November 20, 1871, for all his services in reference to the public lands and also the Osage lands, his earnings, including salary, fees and commissions, amounted in the aggregate to $23,652.09 and he was paid $7,863.07. For the entire period, his maximum compensation at the rate of $3,000 per annum as limited by law and by the instructions sent him by the General Land Office, amounted to $7,577.84. He was therefore overpaid $285.23 (R., 11, 12).

The Act of Congress approved March 3, 1903 (32 S. L., 1010), permitted any of said registers and receivers who were engaged in the sales of said Osage lands to bring suit in the Court of Claims against the Osage Nation and the United States to determine the claim of the plaintiff for commissions or compensation for the sale of said lands or any service or duty connected therewith. The Act conferred jurisdiction on that Court to hear and determine the suit and render judgment on the merits; permitted either party to appeal to this Court; required the Attorney General to

appear on behalf of both defendants, and also permitted the Osage Nation to appear by an attorney employed by it (R., 1).

Under said Act the appellant, on March 20, 1903, filed his petition in the Court of Claims, wherein the Attorney General on behalf of the United States filed a general traverse, and the Osage Nation by its attorney appeared and pleaded the general issue, not indebted; upon which pleadings and the evidence the court made findings of fact, and decided as a conclusion of law that the claimant was not entitled to recover and that his petition should be dismissed, and judgment was rendered and entered accordingly dismissing the petition; from which judgment the claimant appeals to this court (R., 6–16).

In the court below the Osage Nation, in its separate brief, denied any privity with the claimant, and contended that it was the duty of the United States, as trustee and guardian of the Osages, to protect them against greater expense in the sale of their lands than was incurred in the sale of public lands; that the waiver of the statutory bar to this suit was inoperative as to the Osages; and that, therefore, in case of judgment for the claimant, it must be against the United States alone and not against the Osage Nation. At the hearing, however, upon oral argument by counsel for the respective parties, it was conceded that this question was not then involved, and argument and consideration thereof were postponed to await the determination of the question of the claimant's right to recover. If such right shall be established, the Osages desire to be heard by counsel on the question so reserved.

The question involved on this appeal is presented by the claimant's contention in his petition (R., 2, 3) that his duties as register were prescribed and defined by the Statutes of the United States, and consisted of services in the disposal of the public lands of the United States; that while performing his duties as register of the United States Land Office at Humboldt, Kansas, the Secretary of the Interior,

through the Commissioner of the General Land Office, required him to perform, and he accordingly did perform, the further duty of assisting to dispose of the Osage ceded, trust and diminished reserve lands; that said lands were not public lands of the United States, but were private lands of the Osages, which it was no part of his duty as such register to assist in disposing of; that the reasonable value of his services in disposing of said Osage lands was the same as that provided by statute for the disposal of public lands, to wit: one dollar for each declaratory statement filed and a commission of one per centum on all moneys received at the receiver's office, amounting in all to $23,104.44, for which he prays judgment.

The Osage Nation, however, contends that by the terms of the treaty it became and was the duty of the United States, in disposing of the Osage lands, to utilize its established agencies concerning public lands, and that so far as concerned the right of registers and receivers to compensation for services concerning said Osage lands they should be regarded as public lands; or, on the other hand, if the claimant could not be required, as part of his statutory duties, to perform said services, then he is bound by the terms of the instructions under which he undertook to perform and did perform them.

Briefly stated, the main issue is whether or not the statutory limitation of the claimant's compensation as register is applicable to services rendered concerning said Osage lands, either by force of the statute or in consequence of his own act in performing said services under instructions fixing and limiting the amount of his compensation.

POINTS AND AUTHORITIES.

I.—JURISDICTION.

The Act of March 3, 1903, permitted the appellant to bring this suit to determine his claim and conferred jurisdiction upon the court "to hear and determine said cause

and to render judgment thereon on the merits." This was not intended to confer any extraordinary jurisdiction, but was merely a waiver of the statute of limitations. "On the merits" means in accordance with the law and the facts.

As stated in Hawkins *v.* U. S., 96 U. S., 698, "Mere applications for extra allowance, unsupported by any contract, express or implied, must be made to Congress, where alone they can be properly entertained."

The claimant accepts this view by resting his claim,—not upon an abstract notion of what would have been just under the circumstances, and without regard to statutory limitations or to the terms of his employment,—but upon the theory of an implied contract to pay him "the reasonable value" of the services rendered by him as register in compliance with the requirements of the Secretary of the Interior.

II.—The Brindle Case.

The claimant in his brief contends that in the case of U. S. *v.* Brindle, 110 U. S., 688, the right of registers and receivers to a reasonable compensation for the sale of Indian lands under treaties similar to the Osage treaty of 1865 was settled and adjudicated by this court.

This contention is wholly unfounded. The question in that case was not as to Brindle's right, as receiver, to compensation for the sale of such Indian lands, but was as to his right to reasonable compensation for services rendered by him, under special appointments, to assist the special commissioner in disposing of Indian trust lands at Fort Leavenworth and also at Paoli; he being at the same time receiver of public moneys for the district of lands subject to sale at Lecompton. His claim for compensation for services under the special appointments was opposed under the Act of August 31, 1852, 10 S. L., 100, Section 18, as follows: "No person hereafter who holds or shall hold any office under the Government of the United States whose salary or annual compensation shall amount to the sum of

two thousand five hundred dollars shall receive compensation for discharging the duties of any other office."

The court held that under the special appointments Brindle "was employed to render a service in no way connected with the office he held. He was not appointed to any office known to the law. No new duty was imposed on him as receiver of the land office." That disposed of the whole question. The Court in summing up said, "So far as anything appears in the record, the appointment was not made because Brindle was receiver of the land office. The duties to be performed were of a different character and at a different place from those of the land office, and while the exact amount of compensation for this service was not fixed, it was clearly to be inferred that such compensation as the law implies, where labor is performed by one at the request of another, that is to say, a reasonable compensation, would be paid. This case comes, therefore, within the rule in Converse *v.* United States (21 How., 463), and Brindle is not excluded by the Act of 1852 from demanding compensation for this service by reason of his being receiver of the Land Office."

In this case the facts are exactly the reverse of those in Brindle's case. Stewart received no special appointment. The service for which he claims pay was connected with his office as register at Humboldt. He was instructed to perform such service as a new duty to be performed by him as register, and of the same character and at the same place as the duties pertaining to his office of register. Furthermore, special provision was made and accepted by him concerning his compensation for such service, and he has been fully paid the compensation so provided to be paid.

III.—Duties of Register.

The United States undertook, by the terms of the treaty, which had the force of law, to make sale of the Osage lands in the same manner and by the same means as those em-

ployed in the sale of public lands. This brought the Osage lands under the management of the General Land Office, and imposed upon the registers and receivers the duty of aiding in the sale of these lands at their respective offices upon the same terms as those prescribed concerning the sale of public lands. That was the intent and legal effect of the treaty itself, and to that extent Congress, in approving the treaty, thereby added to and increased the official duties of registers and receivers and many other officers and employees of the Government.

The sale of the Osage lands was a part of the claimant's duty, either by force of law, as above stated, or else by his acceptance of the terms of his employment, as stated in the instructions from the General Land Office. In either event, he is bound by the statutory limitation fixing his maximum compensation.

He was allowed, for the additional duties, what he and the Commissioner of the General Land Office then considered an adequate augmentation of pay. Had he considered it inadequate, he had his remedy under the Act of August 18, 1856 (11 S. L., 91), which provides that in the settlement of accounts of registers and receivers of the public land offices, the Secretary of the Interior may allow, subject to the approval by Congress, reasonable compensation for additional clerical service and extraordinary expenses incident to said offices, as he shall think proper.

IV.—Express Contract; Estoppel.

The instructions of 1867 and 1871 fix and limit the amount of claimant's compensation.

Here was an express promise to pay a specified amount, which cannot be converted into an implied promise to pay any other amount.

Hawkins *v.* U. S., 96 U. S., 689.

An insurance agent who received the company's circular stating his commissions, and who acted on it and received

and adjusted his compensation by it, is estopped to deny that it was the measure of his compensation.

Stagg *v.* Conn. Mut. L. Ins. Co., 10 Wall., 589.

The claimant must confront this alternative: that he undertook the work upon the understanding either that he *was* bound, or else that he *was not* bound, by the terms of the instructions of 1867. In the former case he is estopped by that understanding. In the latter case he is estopped by his conduct, which was misleading, for had he then protested or asserted a claim for more than he was allowed and paid, the Government should and would have taken proper steps to protect itself and avoid an excessive expense in the execution of the trust.

Coleman *v.* U. S., 81 F. R., 824;
Gordon *v.* U. S., 31 C. Cl., 254;
U. S. *v.* Martin, 94 U. S., 400.

At the time of his appointment in 1869 the claimant knew the law provided a certain salary and fees and commissions for the services to be performed in and about the sale of public lands, but also fixed a maximum limit of his compensation quarterly. He then also knew that the instructions of 1867 fixed the rate and limit of his compensation for making the sale of the Osage lands. But he did not know at that time whether or not his earnings in making sale of public lands in every or any quarter would reach the maximum limit, and the opportunity to ensure the attainment of such maximum under the instructions of 1867 was a reasonable inducement and a sufficient consideration for the acceptance by him of the terms of the instructions of 1867 and of the later instructions of 1871.

During 1870 he earned and was paid his maximum by sales of public lands alone, but in 1869 and 1871 his earnings from that source did not reach the maximum limit, and he was allowed the difference to make up the maximum on account of his earnings in the sale of Osage lands.

His accounts were prepared, forwarded to the proper accounting officers of the Government, and settled, and the balances found due to him were paid, all in accordance with said instructions and without protest or objection from him.

The terms of the instructions are the terms of his employment and constitute an express contract binding on both parties; surely binding then and no less binding now, more than thirty years after the accounts were stated and closed.

V.—Implied Contract.

There is nothing in the case to support or create an implied contract.

The instructions made it very clear to the claimant what the Government expected of him and what it expected to pay him for his services.

An implied contract will not be raised contrary to the express declarations of the party sought to be charged, made at the time of the supposed undertaking.

Nutt *v.* Minor, 14 How., 474;
4 Cyc., 325, 326, and cases cited.

When a special contract has been fully executed according to its terms, and nothing remains to be done but the payment of the price, the plaintiff may sue on the contract, or in *indebitatus assumpsit* and rely upon the common counts, but "in either case the contract will determine the rights of the parties." The plaintiff "must produce the contract at the trial, and it will be applied as far as it can be traced."

Ingle *v.* Jones, 69 U. S., 2 Wall., 1.

To raise an implied assumpsit, the plaintiff must establish facts from which the duty to pay may reasonably be presumed.

Cary *v.* Curtis, 3 How., 236;
Fiedler *v.* Curtis, 2 Black, 461.

The facts are, that in the sale of public lands the United States limited a register's compensation to not exceed $3,000 per annum. The legislation on this subject was fully reviewed in U. S. *v.* Babbitt, 66 U. S., 1 Black, 55, at December Term, 1861. The policy announced in that decision was known to the parties to the treaty of 1865, and such knowledge affected their understanding and intent at that time, which must now be the guide. The Osages were then justified in the belief that the sales would be made at no greater cost than that fixed by the Government for the sale of public lands. That was also the understanding of the Government, as shown by the contemporaneous declarations of the Interior Department in the instructions of 1867.

Another fact is, that the claimant has been paid for his services, and accepted without protest what was agreed to be paid at the time.

There is no fact in the case upon which to predicate a claim that the United States or the Osage Nation is under any legal or moral duty to pay the claimant anything.

If the claimant is entitled to recover, why should not the officers and clerks and other employees of the Interior Department, whose labors were also increased by the same work concerning the sale of Osage lands, also receive extra compensation? and if so, where will the cost of the transaction end? Is it possible that the treaty contemplated such an expense? The claimant has, apparently, less right than they by reason of the express contract, limiting his compensation, contained in the instructions of 1867.

The opinion of the Court of Claims is adopted as part of this brief. The judgment of that court is right, and should be affirmed.

LORENZO A. BAILEY,
Attorney for the Osage Nation.

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THE UNITED STATES AND THE OSAGE NATION OF INDIANS.

Additional Brief on Behalf of the OSAGE NATION.

This brief is in reply to the proposition, contained in the brief for the United States (pp. 18, 19), that if the claimant recover, the amount should be charged against the Indian fund and not paid out of the public treasury.

As indicated in the brief for the Osages (p. 4) it was supposed that consideration of the secondary question of contingent liability, as between the defendants, was postponed to await the determination of the primary question as to the claimant's right to recover; but the Osages are invited by the Attorney General to meet the secondary issue now.

I.

This suit, in the language of the act of Congress conferring jurisdiction on the court, is "to determine the claim of the plaintiff;" the purpose being to determine which, if either, of the defendants is indebted to the plaintiff. It is

a suit, as at law, *in personam*; not, as in equity, to follow trust funds or opening up accounts between the United States as trustee and the Osage Nation as *cestui qui trust*.

No privity between the claimant and the Osage Nation is alleged or proven.

The cause of action is to recover the reasonable value of services rendered by the claimant at the special request of the United States.

In this transaction the United States had no authority from the Osage Nation to act as its agent. The relation between them was one of trust; not of agency.

A trustee who covenants in his own name, even with the addition of the words "as trustee," &c., will be liable personally. The addition is matter of description, not affecting the rights or remedies of the covenantee.

Duvall *v.* Craig, 2 Wheat., 45, 56.

Persons dealing with a trustee must look to him for payment of their demands and cannot resort to the trust estate.

Norton *v.* Phelps, 105 U. S., 393.

A trustee is personally bound by the contracts which he makes as trustee, even when designating himself as such, unless he stipulates that he is not to be personally responsible, but that the other party is to look solely to the trust estate.

Taylor *v.* Davis, 110 U. S., 330.

Therefore, if the claimant recover, the judgment must be against the United States and not against the Osage Nation.

II.

If, on the other hand, the court shall hold that Congress contemplated an equitable proceeding and shall sustain the claimant's contention for additional compensation, then the case should go back to the Court of Claims for the purpose

of a full accounting as between the defendants concerning the sale of the Kansas lands.

The aggregate amounts received by the United States, acting as trustee in this transaction, under the treaty, were as follows (R., 12):

From sales, ...	$10,663.318.28	
Filing fees, ...	139.166.00	
Total, ...		$10,802,484.28
The amount of the trust fund, as stated by the trustee, is		8,327,439.07
The difference, 23 per cent. of the total, is		$2,475,045.21

Out of the proceeds of the sale of the ceded lands, the trustee retained for the civilization fund, to meet a charge which rested primarily upon the United States and to carry out and enlarge the act of March 3, 1819 (3 S. L., 516), the sum of $755,162.01, and also retained all the filing fees, amounting to $139,166. These two items, amounting to $894.328.01, represent a clear profit to the trustee in this transaction.

By what right the Government has withheld from the Osages the filing fees, has not been explained; nor can the ordinary conscience approve the enforced contribution to the so-called civilization fund.

Furthermore, this suit was barred by the statute of limitations as against the United States, and the Osage Nation was immune from suit. If the United States see fit to remove the statutory bar, such waiver should not be construed to operate as in violation of the duty the Government owes as guardian, trustee and protector of the Osages. It may give away what is its own, but not that which is its ward's.

True, the treaty provided for payment of the expenses incident to the proper execution of the trust; but if the

court find for the claimant, such finding will not necessarily imply that the amount due him is an expense "incident to the proper execution of the trust." In such case, the Government will be in the position of a trustee claiming reimbursement for reasonable and proper expenses, and must show they were reasonable and proper.

In this connection, it is to be borne in mind that the terms of the treaty required the Government to utilize its established agencies for the sale of lands; that the Osages had a right to expect that the Government would not allow the expense to exceed that incurred in the sale of public lands.

It follows, therefore, that if the Government has failed to take the necessary measures to limit the cost of the sale of the Osage lands so as not to exceed the cost of the sale of public lands, or if it has been negligent in the performance of the trust or has made a profit on the trust transaction or has failed in any of its duties as trustee, it is in no position to seek the aid of the court in getting any further benefit or relief at the expense of the *cestui qui trust.*

As to the ceded lands, the United States, by the terms of the treaty, assumed the cost of survey and sale. As to the filing fees, the Government has never accounted as trustee. In no event could a recovery by the claimant as to the ceded lands and filing fees be charged against the Osage Nation.

As to the trust and diminished reserve lands, the Government should not be allowed to reopen stale claims, or waive any defenses, in violation of the trust created by the treaty, or to retain any profit by the trust transaction. If the claimant recover, the judgment should therefore be against the United States and not against the Osage Nation.

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